LIM SZE MEY v. LOOI GUAN HEON

HIGH COURT MALAYA, SHAH ALAM
HAYATUL AKMAL ABDUL AZIZ J
[DIVORCE PETITION NO: 33-269-06-2020]
8 MAY 2021

FAMILY LAW: *Divorce – Petition – Application for – Cause papers for divorce petition served to husband – Whether wife could petition for divorce – Whether parties referred to conciliatory body – Whether conciliatory body certified that parties could not reconcile – Whether statutory certificate could be dispensed with – Whether application for dispensation for reference to marriage tribunal could be made in divorce petition – Law Reform (Marriage and Divorce) Act 1976, ss. 53 & 106*

The petitioner wife ('PW') filed this single divorce petition under s. 53 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') against the respondent husband ('RH'). On 22 July 2020, at the first case management ('CM') before the Deputy Registrar ('DR'), the PW informed the court that they had served the cause papers on the RH *via* an AR registered post to his last known address. A person named Looi Eng Gian had signed the returned AR card and acknowledged receipt of all cause papers with the covering letter but they had yet to receive any reply or feedback from the RH. The DR informed the PW that the cause papers were not in order as: (i) s. 106(1) of the LRA provides that no person shall petition for divorce unless he/she has first referred to a conciliatory body and that body has certified that it failed to reconcile the parties. The statutory certificate in question referred to was JPN.KC29 issued by the National Registration Department ('NRD'); (ii) the PW only enclosed JPN.KC28 which was a letter issued by NRD stating that the RH failed to be present before the Marriage Tribunal. JPN.KC28 was not the required statutory certificate under s. 106(1) of the LRA; and (iii) referring to the divorce petition, an application for dispensation for reference to the Marriage Tribunal could not be made in the petition itself but had to be made by an originating summons ('OS') to secure the required dispensation order from the court before the filing of the divorce petition. On 26 August 2020, the PW informed the DR that the RH had contacted them and that he had received all the cause papers and letter informing him of the next CM date on 25 August 2020. The DR told the PW that she had yet to receive any notice of appointment of solicitors for the RH and after considering that the cause papers were served on him on 25 August 2020, he had eight days to reply to the divorce petition and the next CM date was fixed for 4 September 2020. On 4 September 2020, the PW informed the court that the RH had not replied to the divorce petition and requested for further direction. On 19 September 2020, the PW applied for a postponement because of the conditional movement control order (CMCO) and this date was vacated with

A the next hearing date fixed for 15 January 2021. However, due to the movement control order (MCO), the hearing date was vacated and the hearing date was fixed for 8 March 2021 before a judge. On 8 March 2021, the PW was informed by the court that their papers were not in order. An option to withdraw the divorce petition was given but the PW declined and
B wanted a ruling to be made by the court so the appeal could be filed and pursued at the Court of Appeal.

Held (dismissing petition without prejudice):

(1) An application should be made by way of an OS for leave to dispense
C with the referral instead of filing a divorce petition and seeking the exemption within the divorce petition itself in the divorce proceedings. Section 106 of the LRA is evident that no petition for divorce shall be presented unless the marital difficulty is first referred to a conciliatory body. The statutory certificate in the form of JPN.KC29 must be firstly secured or a dispensation is procured from the court before presenting
D the divorce petition. One cannot present the petition and, at the same time, in the divorce petition, apply for dispensation since the divorce petition had already been erroneously filed without a dispensation or JPN.KC29. It followed that the legal prerequisites to the filing of the divorce petition had not been followed, rendering the cause papers filed
E to be premature and not in order. (para 8)

(2) The PW had committed statutory non-compliance in the filing of the divorce petition, which was fatal. Apart from the letter JPN.KC28, which merely stated that the RH failed to attend the scheduled meetings, no other evidence was offered to substantiate that the RH had wilfully
F failed to attend those scheduled meetings. There was no averment by the PW as to how the RH wilfully failed to attend the scheduled meetings. It was an error in judgment to expect the court to make an inference of wilfulness when JPN.KC28 merely said failure to attend and nothing else. Form 2 of the LRA (General Form of Petition) does not contain
G anything about prayers for leave to file the divorce petition. It is a statutory form that could not be amended to suit the need or wants of the PW at her request. (para 11)

(3) The divorce petition was dismissed without prejudice since the merits of the divorce petition have yet to be ventilated. The actions of the PW
H in the filing of the divorce petition were not in line with established norms and practices in family matters, constituting a fatal procedural error that could not be remedied as well as her reluctance to abide by the instructions of the court to regularise her papers. The PW had the option of refiling the cause papers once she regularised her papers as per
I the court's instruction. (paras 2, 7 & 12)

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
C v. A [1998] 4 CLJ 38 HC ***(refd)***
Chin Pei Lee v. Yap Kim Choong [2010] 4 CLJ 843 HC ***(refd)***
Crawford v. Spooner (1846) 6 Moore PC 1 ***(refd)***
Kanhk Sunder Bibi v. Ram Lekhan Pandey AIR 1956 Pat 325 ***(refd)***
Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh [2010] 3 CLJ 724 HC ***(refd)***
KKP v. PCSP [2014] 8 CLJ 626 HC ***(refd)***
Lim Seh Cheoon v. Tan Lai Yee & Anor [2019] 1 LNS 1471 HC ***(refd)***
Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***
Ong Gek Cheng lwn. Chong Chee Leong [2019] 1 LNS 39 HC ***(refd)***
Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 HC ***(refd)***
Tuan Hj Zulkifli Hj Hussain & Ors v. IOI Corporation Bhd & Ors [2012] 4 CLJ 401 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 67
Divorce and Matrimonial Proceedings Rules 1980, r. 8
Evidence Act 1950, ss. 101, 102, 103
Law Reform (Marriage and Divorce) Act 1976, ss. 50(1), (2), (3), 51(3), 52, 53, 106(1)(iii), (iv), (vi), (3), (5)(b)
Law Reform (Marriage and Divorce) Rules 1982, r. 16A
Rules of Court 2012, O. 18 r. 19(1)(b), (d)

For the petitioner wife - WH Kan & Goh Loh Boon; M/s WH Kan

Reported by Lina E

JUDGMENT

Hayatul Akmal Abdul Aziz J:

Introduction

[1] The petitioner wife ("PW") is appealing against the ruling of this court in dismissing without prejudice (since merit has yet to be determined), her divorce petition ("DP") for statutory non-compliance with s. 106(1) of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("LRA").

Brief Facts

[2] The brief facts disclosed from the cause papers and this court's minutes, are as follows:

(i) On 11 June 2020: PW filed this single DP under s. 53 LRA against the respondent husband ("RH").

(ii) On 22 July 2020: At the first case management ("CM") before the learned Deputy Registrar (Timbalan Pendaftar: "TP"), learned counsel informed the court that they had served the cause papers on RH *via* an

AR registered post to his last known address. A person named Looi Eng Gian had signed the returned AR card and acknowledged receipt of all-cause papers with the covering letter on 26 June 2020. Learned counsel informed the court that they have yet to receive any reply or feedback from RH, and she asked for further direction from the court.

The learned TP then informed learned counsel that the cause papers are not in order because of the following:

(a) section 106(1) LRA provides that no person shall petition for divorce unless he/she has first referred to a conciliatory body, and that body has certified that it has failed to reconcile the parties. The statutory certificate in question is referred to as JPN.KC29 issued by the National Registration Department (Jabatan Pendaftaran Negara: "JPN");

(b) in the present DP, PW only enclosed JPN.KC28 (Lampiran C), which is a letter issued by JPN stating that RH had failed to be present before the Tribunal ("Suami Tidak Hadir 3 Sessi Tribunal Mengikut Alamat Diberikan Pemohon 22 Ogos 2019, 3 Oktober 2019, 7 November 2019"). The learned TP then informed learned counsel that JPN.KC28, as enclosed in the said DP, is a mere letter from JPN and is not the required statutory certificate under s. 106(1) LRA;

(c) referring to the DP at para 38(a), learned counsel was told that an application for dispensation for reference to the marriage tribunal could not be made in the petition itself but had to be made by an originating summons ("OS") to secure the required dispensation order from the court, before the filing of the said DP;

(d) disagreeing with the direction given by the learned TP, learned counsel argued and insisted that their cause papers are in order and they have complied with the provision of s. 106(1)(iii) LRA because of the proviso:

> **Provided that** this requirement shall not apply in any case (iii) where the respondent has been required to appear before a conciliatory body and has willfully failed to attend.

(e) in support of her argument, learned counsel referred to other High Court decisions in *C v. A* [1998] 4 CLJ 38, *Ong Gek Cheng lwn. Chong Chee Leong* [2019] 1 LNS 39 dan *Lim Seh Cheoon v. Tan Lai Yee & Anor* [2019] 1 LNS 1471 to support her arguments. She remained adamant in not filing any separate OS asking for dispensation but will proceed with the present DP and argue the case before the judge. The learned TP then fixed the next CM date for 26 August 2020.

(iii) On 26 August 2020: Learned counsel informed the learned TP that RH had contacted them. On 25 August 2020, he received all the cause papers and a letter informing him of the next CM date. An undertaking to file an affidavit of service as soon as possible was given. The learned TP told learned counsel as of that date, she has yet to receive any notice of appointment of solicitors for RH, and after considering that the cause papers were served on him on 25 August 2020, he has eight days to reply to the said DP, and the next CM date was fixed for 4 September 2020.

(iv) On 4 September 2020: Learned counsel informed the court that RH has not replied to the DP and requested further direction. The learned TP confirmed that RH had not filed any "Akuan Penerimaan Penyampaian", and the hearing date was fixed for 22 October 2020. However, due to the conditional movement control order ("CMCO") in place, the hearing date was fixed for 19 November 2020.

(v) On 19 November 2020: Learned counsel for PW applied for a postponement because of CMCO, and this date was vacated, with the next hearing date fixed for 15 January 2021.

(vi) On 15 January 2021: Due to the movement control order ("MCO"), the hearing date was vacated, and the next hearing date was fixed for 8 March 2021 before the judge.

(vii) On 8 March 2021: I informed learned counsel that I had determined that their papers are not in order. I also told them that the cases cited by him earlier are decisions of the High Court of coordinate jurisdiction, which is merely persuasive but is not binding on this court. An option to withdraw the said DP was given, but he declined and wanted a ruling to be made by this court so this appeal can be filed and pursued at the Court of Appeal. I, therefore, dismissed the said DP for statutory non-compliance with s. 106(1) LRA and the court's instructions. I did not dismiss the said DP with prejudice since the merits have not yet been ventilated, where PW has the option of refiling the cause papers once she regularised her papers as per the court's instruction.

The Law

[3] The Courts of Judicature Act 1964 (Act 91) ("CJA") provides:

(i) Section 67. Jurisdiction to hear and determine civil appeals

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

(2) The Court of Appeal shall have all the powers conferred by s. 24A on the High Court under the provisions relating to references under an order of the High Court.

(ii) Section 3. Interpretation

In this Act, unless the context otherwise requires:

"decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;.

[4] The Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("LRA") provides:

106 Requirement of reference to the conciliatory body before a petition for divorce

(1) No person shall petition for divorce, except under ss. 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:

Provided that this requirement shall not apply in any case:

(i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;

(ii) where the respondent is residing abroad, and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;

(iii) where the respondent has been required to appear before a conciliatory body and has willfully failed to attend;

(iv) where the respondent is imprisoned for a term of five years or more;

(v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or

(vi) where the Court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.

[5] The Law Reform (Marriage and Divorce) Rules 1982 ("LRR") provides:

16A Reference to conciliatory body

(1) An application to refer to the conciliatory body under s. 106 of the Act shall be in Form JPN.KC14 in the First Schedule.

(2) Upon the failure to resolve the matrimonial difficulty under s. 106(5)(b) of the Act, the conciliatory body shall issue a certificate in Form JPN.KC29 in the First Schedule.

[6] The Divorce and Matrimonial Proceedings Rules 1980 ("DMPR") provides:

8 Contents of petition.

(1) Unless otherwise directed, every petition, other than a petition under Rule 80 or 81, shall contain the information required by Form 2 as near as may be in the order there set out and any further or other information required by such of the following paragraphs of this Rule as may be applicable.

(2) A petition for divorce, nullity or judicial separation:

(a) shall state whether or not there are to the knowledge of the petitioner any proceedings continuing in any country outside Malaysia which are in respect of the marriage to which the petition relates or are capable of affecting its validity or subsistence; and

(b) if there are any such proceedings, shall give particulars of them including:

(i) **the court in or the tribunal or authority before which they were begun**; (emphasis added)

(ii) the date when they were begun;

(iii) the names of the parties;

(iv) the date, or as the case may be, the expected date of any trial in the proceedings; and

(v) such other facts as may be relevant to the question whether the proceedings on the petition should be stayed.

(3) For the purposes of paragraph (2) "proceedings continuing in any country outside Malaysia" includes any proceedings which are not instituted in a court of law in that country, if those proceedings are instituted before a tribunal or other authority in that country having power under the law having effect there to determine questions of status, and proceedings shall be treated as continuing in a country outside Malaysia if they have been begun and have not been finally disposed of.

(4) A petition for a decree of nullity under s. 68 of the Act shall state whether the petitioner was at the time of the marriage ignorant of the fact alleged.

(5) A petitioner who intends to adduce evidence that a person:

(a) was found guilty of adultery in matrimonial proceedings or was adjudged to be the father of a child in affiliation proceedings before a court in Malaysia, must include in his petition a statement of his intention with particulars of:

(i) the finding or adjudication and the date thereof;

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(ii) the court which made the finding or adjudication and the proceedings in which it was made; and

(iii) the issue in the proceedings to which the finding or adjudication is relevant.

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Findings Of This Court

[7] I dismissed the DP by PW fundamentally for non-compliance with s. 106(1) LRA requirements and failing to comply with the instructions given by the court. It is nevertheless dismissed without prejudice since the merits of the said DP have yet to be ventilated. I find that the actions of PW in the filing of the said DP are not in line with established norms and practices in family matters, constituting a fatal procedural error that cannot be remedied as well as her reluctance to abide by the instructions of the court to regularise her papers.

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[8] In a nutshell, the established norms and practices under the Law Reform (Marriage and Divorce) Act 1976 (LRA), Law Reform (Marriage And Divorce) Rules 1982 (LRR), and Divorce and Matrimonial Proceedings Rules 1980 ("DMPR"), pertaining to the present proceeding before this court are these:

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The Legal Position

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(i) There are two legal pre-requisites to the filing of a divorce petition in the Family Court:

(a) Parties to the marriage have been married for at least two years (s. 50(1) LRA); and

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(b) That the marital difficulty has been referred to a conciliatory body (s. 106(1) LRA), and the said body failed to reconcile the parties and accordingly issued the statutory certificate (JPN.KC29 in the First Schedule), which will allow the DP to be presented in court.

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Section 16A LRR

(1) An application to refer to the conciliatory body under s. 106 of the Act shall be in Form JPN.KC14 in the First Schedule.

(2) Upon the failure to resolve the matrimonial difficulty under s. 106(5)(b) of the Act, the conciliatory body shall issue a certificate in Form JPN.KC29 in the First Schedule.

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The legislators enacted these two requirements to check impetuous and rush to divorce spouses (see *Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh* [2010] 3 CLJ 724).

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These two requirements do not apply in cases where it involves conversion to Islam (s. 51(3) LRA) of a spouse to the marriage, while only the first pre-requisite (not the second) applies to a joint petition for divorce by mutual consent (s. 52 LRA).

The two-year requirement under s. 50(1) LRA is, however, subject to an exception in that the said section does allow the presentation of a petition for divorce within the two years on the ground that the case is one of the exceptional circumstances or hardship suffered by the petitioner, with the court having regard to the interests of any child of the marriage and the question whether there is a reasonable probability of a reconciliation between the parties: s. 50(2). Matters occurring in the first two years of marriage are not excluded (s. 50(3) LRA) in the divorce petition.

(ii) Two options for dispensation with the preceding pre-requisites

(a) **Dispensation with the two-year term**

Any application for the dispensation of the two-year term must be made before filing the divorce petition (s. 50(1) LRA):

> (1) Subject to sub-s. (2), **no petition for divorce shall be presented to the court before the expiration of the period of two years from the date of the marriage** (hereafter in this section referred to as "the specified period").

An application to the court by way of an OS for leave must be made **before presenting the divorce petition**. The application must be supported by an affidavit setting out the reasons and basis for the request, addressing the exceptional circumstances and hardship, the interests of any children, and whether any reconciliation will be possible (*Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh* (*supra*) what constitute exceptional circumstances and hardship).

(b) **Dispensation with reference to the conciliatory body**

Section 106 LRA stipulates the mandatory requirement for any matrimonial difficulty to be first referred to a conciliatory body before a divorce petition can be presented (see *KKP v. PCSP* [2014] 8 CLJ 626; [2014] 8 MLJ 757), with permitted exceptions:

> **106 Requirement of reference to the conciliatory body before a petition for divorce**
>
> (1) *No person shall petition for divorce, except under ss. 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties*:
>
> Provided that this requirement shall not apply in any case:
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> (i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;

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(ii) where the respondent is residing abroad, and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;

(iii) where the respondent has been required to appear before a conciliatory body and has willfully failed to attend;

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(iv) where the respondent is imprisoned for a term of five years or more;

(v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or

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(vi) **where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable**.

(2) A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties but, where they are unable to agree on a conciliatory body, shall be referred to the marriage tribunal for the area in which they reside or where they are living in different areas, to the marriage tribunal for the area in which they had last resided together.

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(3) A "conciliatory body" means:

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(a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan, or association;

(b) a marriage tribunal; or

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(c) any other body approved as such by the Minister by notice in the *Gazette*.

(4) A marriage tribunal shall be set up for such specified area or district as the Minister may decide, consisting of a Chairman and not less than two nor more than four other members who shall be nominated by the Minister, or by such officer to whom the Minister may have delegated his powers to in that behalf.

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(5) ...

(a) A conciliatory body to which a matrimonial difficulty has been referred shall resolve it within the period of six months from the date of reference; and shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may if it considers it necessary, adjourn its proceedings, from time to time.

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(b) *If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage.*

(c) No advocate or solicitor shall appear or act as such for any party in any proceeding before a conciliatory body, and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

Section 106 LRA is anchored on the premise to encourage reconciliation between parties. To apply for an exemption because parties do not want a reconciliation belittles the institution of marriage and invites abuse by opening the floodgates to litigations (see *Chin Pei Lee v. Yap Kim Choong* [2010] 4 CLJ 843). The mandatory requirement for the production of the statutory certificate in JPN.KC 29 must be put to rest once and for all to mitigate further uncertainties by Family Court legal practitioners substituting their reading into otherwise, already precise statutory requirements (see r. 16A LRR, and s. 106(5)(b) LRA, r. 8 DMPR).

Similarly, with the dispensation of the two-year term, the dispensation for referral is also by way of an OS before filing a divorce petition, as seen in *Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh* (*supra*).

Respectfully I differ with the legal proposition by *C v. A* [1998] 4 CLJ 38 that in relying on the provisos, including s. 106(1)(vi) LRA (the court to be satisfied with the existence of the exceptional circumstances which make reference to a conciliatory body impracticable), a party can proceed to file a divorce petition. It suggested that upon a preliminary objection being raised, it is sufficient for the petitioner to either give oral or affidavit evidence to satisfy the court that there are exceptional circumstances. *C v. A* (*supra*) anchored this proposition and said that it is not the intention of Parliament to cause hardship to litigants, more so in divorce matters where it might become necessary for parties to put an end to their marriage as soon as possible, to be able to start their lives afresh. I respectfully differ and find this proposition to be untenable in the circumstances. It is trite that the courts of law can only interpret the law as passed by the Parliament and nothing more. In making the construction of those provisions, the court cannot substitute its own scheme of things as that would be against the principles of law in statutory construction. Using the court's inherent power in the circumstances would be an error in judgment. It is for the Parliament to legislate, and that function is not delegated to the courts of law. *Tuan Hj Zulkifli Hj Hussain & Ors v. IOI Corporation Bhd & Ors* [2012] 4 CLJ

401; [2011] MLJU 665, ruled that the court is not allowed to read into a document deeming provisions in the event of a lacuna. The Privy Council in *Crawford v. Spooner* (1846) 6 Moore PC 1, pp. 8, 9 said that: "We cannot aid the legislature defective phrasing of an Act, we cannot add or mend and, by construction makeup deficiencies which are left there."

In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269, the Federal Court cited with approval the speech by Lord Steyn in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771:

> In determining the meaning of the language of a commercial contract and unilateral contract notices, the law therefore generally favors a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language ...
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> The most recent statement of the guideline to the interpretation of contracts statutes and other instruments is to be found in *Attorney General of Belize v. Belize Telecom Limited* (2009) UKPC 11, where delivering the advice of the Board, Lord Hoffmann said: *"The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties, the intention of the parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.*

On these premises, I also beg to differ with *C v. A* (*supra*) use of the inherent powers of the court to hold that attempts by relatives to reconcile parties as being appropriate to satisfy the requirements of s. 106 LRA. This determination in *C v. A* (*supra*) would appear to be not in accord with s. 106(3) LRA, which define the conciliatory body expressly:

> (3) A "conciliatory body" means:
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> (a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan, or association;

(b) a marriage tribunal; or

(c) any other body approved as such by the Minister by notice in the *Gazette*.

Therefore, it is my considered view that an application should be made by an OS for leave to dispense with the referral instead of filing a divorce petition and seeking the exemption within the divorce petition itself in the divorce proceedings. Section 106 LRA is evident that no petition for divorce shall be presented unless the marital difficulty is first referred to a conciliatory body. The statutory certificate in the Form of JPN.KC29, First Schedule must be firstly secured, or a dispensation (proviso) is procured from the court before presenting the divorce petition. You cannot present the petition and, at the same time, in the said divorce petition, apply for dispensation since the divorce petition had already been erroneously filed without a dispensation or JPN.KC29. It follows then that legal pre-requisites to the filing of the divorce petition had not been followed, rendering the cause papers filed to be premature and not in order.

Section 106 (1) LRA:

No person shall petition for divorce, except under ss. 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties...

Section 106 (5)(b) LRA:

If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage.

Rule 16A(2) LRR:

Upon the failure to resolve the matrimonial difficulty under s. 106(5)(b) of the Act, the conciliatory body shall issue a certificate in Form JPN.KC29 in the First Schedule.

Rule 8 DMPR:

Contents of the divorce petition to be Form 2 (General Form of Petition). This statutory Form under para 9 requires narration at reconciliation (9. The following attempts at reconciliation have been made: ...) which will be satisfied by the production of JPN.KC29 or order for dispensation from the court. Party cannot simply amend this para to suit his/her circumstance and attach a letter from JPN (JPN.KC28), which is not the certificate required under s. 106(5)(b) and Rule 16A LRR.

[9] In a nutshell, what learned counsel for PW had presented are:

(i) The marital dispute was referred to the conciliatory tribunal by the wife, but it appeared that after three scheduled meetings at the tribunal had to be abandoned because RH had failed to attend.

(ii) After the third failure to attend, the tribunal issued a letter in the Form of JPN.KC28 to notify her that her application to the tribunal to refer her alleged marital difficulties had to be cancelled since RH failed to be present according to the address given by the applicant (22 August 2019, 3 October 2019, and 7 November 2019), see Lampiran C to the DP.

(iii) Premised on this letter (JPN.KC28), PW proceeded to file her DP in the absence of the statutory Form JPN.KC 29 or a dispensation order from the court, in breach of the s. 106(1), s. 106(5)(b) LRA, r. 16A LRR, and r. 8 DMPR.

(iv) What learned counsel had done was, insert an application for an order for dispensation in the DP itself without complying with the legal pre-requisites (JPN.KC 29 or order of dispensation) before filing the DP. He had effectively put the cart before the horse, which indicates that things are done out of the proper order. In the DP, at para. 38(a), learned counsel inserted this prayer:

> (a) Bahawa Pempetisyen diberi kebenaran untuk memfailkan petisyen pencerain ini tanpa merujukan kesulitan hal ehwal perkahwinan kepada badan pendamai menurut Seksyen 106(1)(iii) Akta membaharui Undang-undang (perkahwinan dan Penceraian) 1976;

(v) PW had premised her allegation under s. 106(1)(iii) that RH had wilfully failed to attend the reconciliation meeting at the tribunal three times. Therefore, it allegedly satisfies the exemption under para (iii) of the proviso. It was anchored primarily on JPN.KC28, which did not indicate expressly or by implication that RH had failed to attend the said meetings wilfully. It merely noted that RH failed to attend based on the address given to the tribunal by PW. There is no other compelling evidence to convince the court of the willfulness of his alleged default. There is no affidavit of facts and evidence to support her allegations since she relied on the DP for this supposed application. The court cannot be expected to accept that version of the story in the absence of convincing evidence, and hence the need for a proper application (*via* an OS) for an order for dispensation supported with an affidavit of facts and evidence.

(vi) Learned counsel took the stand that they don't need to apply for an order for a dispensation before they filed this DP, relying on *C v. A* (*supra*), the salient facts are:

... the petitioner and the respondent were married in 1969 and have two children, now aged 29 and 25. They cohabited together until 1975, when the petitioner left the matrimonial home and set up his own home due to misunderstandings. Cohabitation was resumed during the early part of 1976 at the petitioner's home but the respondent left in the later part of 1976. Since then, neither party had had anything to do with the other, and they had lived apart for more than 20 years. Attempts at reconciliation were made by the petitioner's relatives but without success. The petitioner now petitioned for a dissolution of the marriage with the respondent. The respondent raised the preliminary objection that as the matrimonial difficulty was not first referred to a conciliatory body constituted under the Law Reform (Marriage and Divorce) Act 1976 ('the Act') there was non-compliance with s. 106 of the Act. It was submitted that reconciliation attempts by relatives were not sufficient for the purposes of the Act.

The court, in that case, held that:

[1] If a petition is filed and it becomes necessary for the petitioner to comply with the said proviso, so long as a preliminary objection is taken by the respondent, it is sufficient for the petitioner to either give oral or affidavit evidence to satisfy the court that there are exceptional circumstances.

[2] Pursuant to the said proviso, it is open to the petitioner to satisfy the court that the rules of the court allow him to rely on the fact that he has sought the assistance and advice of persons, namely his relatives. This is an appropriate case to invoke the inherent powers of the court as set out in O. 92 r. 4 of the Rules of the High Court 1980 to prevent injustice. Attempts by relatives to reconcile the parties ought to be accepted and read together with s. 55 of the Act and the said proviso.

The learned judge further stated that:

> It seems to me that pursuant to this section recourse can be made to the rules of the court for a petitioner, before presenting a petition, to rely on such rules to show that the petitioner has sought **the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation** (emphasis provided). Whilst this section refers to the availability of persons or bodies, s. 106 relies only on the requirement of the need to refer to a reconciliatory body.
>
> It is my judgment that pursuant to proviso (vi) of the Act, and it is open to the petitioner to "satisfy the court" that the rules allow him to rely on the fact that he had sought the assistance and advice of persons, namely his relatives. It is my judgment that this is a truly appropriate case to invoke the applicability of O. 92 r. 4 of the Rules of the High Court 1980 (the Rules), which reads:

A

> 4 Inherent powers of the court (O. 92 r. 4)
>
> For the removal of doubts, it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

B

> I, therefore, hold that to prevent injustice, it is appropriate for this court to have that attempts by "saudara mara" (relatives) to reconcile the parties ought to be accepted and read together with s. 55 and proviso (vi) to s. 106 of the Act.

C

(vii) learned counsel also drew my attention to *Lim Seh Cheoon v. Tan Lai Yee & Anor* [2019] 1 LNS 1471, where the learned Judicial Commissioner had endorsed the findings of *C v. A* (*supra*). In this case, the co-respondent filed an application under O. 18 r. 19(1)(b) and (d) Rules of Court 2012 to strike out the divorce petition filed by the petitioner for failure to comply with s. 106(1)(iv) LRA and held as follows:

D

> [16] I am of the view that in the present case, there was no necessity for the PH to obtain a certificate from the conciliatory body. My reason for saying so is because there is *prima facie* evidence that the RW had wilfully failed to appear before a conciliatory body when she was required to do so. This would constitute an exception under s. 106(1)(iii) LRA. There was averment in the petition that the RW failed to turn up for the reconciliation appointments. As mentioned earlier, the letter from the Registrar of Marriages exhibited as "L3" in the petition had stated in no uncertain terms that RW had failed to attend on the three occasions she had been requested to attend. The authenticity of this letter was never disputed by the CR or RW. At this stage it is worthwhile reiterating what was said by RK Nathan J in *C v. A* [1998] 4 CLJ 38 of which this court is in agreement with:

E

F

G

> It is clear that pursuant to s. 106(1) of the Act, obtaining a certificate from the conciliatory body that it has failed to reconcile the parties is a pre- requisite, subject to the provisos. *It would seem that whilst provisos (i)-(v) to s. 106 suggest that the mere averment of such facts in the petition would suffice, proviso (vi) suggests that the court must be satisfied with the existence of the exceptional circumstances.* This leads to the suggestion that evidence must be led for the court to make that decision. Does this mean that if a petitioner intends to rely on proviso (vi) to s. 106, the petitioner must first file an originating summons stating facts which the court ought to rely on, and upon being so satisfied, to give leave to the petitioner to then file a petition. *I do not think so. It is not the intention of parliament to cause hardship to litigants and more so in divorce matters where it might become necessary for parties to put an end to their marriage as soon as*

H

I

possible, so as to start their lives afresh. It is my judgment that if a petition is filed and it becomes necessary for the petitioner to comply with the proviso (vi) to s. 106, so long as a preliminary objection is taken by the respondent, *it is sufficient for the petitioner to either give oral or affidavit evidence to satisfy the court that there are exceptional circumstances*. (emphasis added)

(viii) For reasons as stated in para [8] above, I respectfully differ in findings from the decision in *C v. A* (*supra*), and similarly, I differ in findings with *Lim Seh Cheoon v. Tan Lai Yee & Anor* (*supra*). I hold that legal procedure is put in place for a reason by the legislators, and the court cannot simply forsake it for expediency under the appearance of the court's inherent powers. Certainty in litigation cannot be treated as a hardship to litigants, and neither can being a "social legislation" be an authority to abandon trite and appropriate procedural practices. The court cannot simply inject deeming provisions as it deemed fit in the circumstances.

[10] I wish to mention that in *Law and Practice of Family Law in Malaysia*, 2019, Sweet & Maxwell, YA Lee Swee Seng JCA, and *Handbook On Family Law Practice in Malaysia*, 2019, Sweet & Maxwell, Chris Chin Shang Yoon, and Fion Wong Sook Ling, the learned authors echoed similar views that to obtain an exemption for reference to a conciliatory body, the applicant should file an OS together with an affidavit in support to prove that any one of the proviso to s. 106(1) LRA applies to dispense reference to the conciliatory body, where the applicant shall state the facts concisely in the affidavit in support and to provide supporting evidence before the court may allow such exemption.

Briefly, to summarise the facts, in the present case:

(i) RH failed to attend several meetings at the conciliatory body and a letter JPN.KC28 was issued by JPN, confirming this.

(ii) JPN.KC28 is merely a letter from JPN, whereas JPN.KC29 is a statutory certificate under the First Schedule.

(iii) Instead of filing an OS for dispensation order, PW proceeded to file her DP and, in the same DP at para 38(a), applied for dispensation to file her DP without further reference to the tribunal. Yet, the DP is already filed in court before such dispensation is granted or before securing JPN.KC 29 (statutory certificate).

(iv) It is a trite practice that an application for exemption/dispensation under s. 106(1)(i-vi) has to be filed before filing the DP to enable the court to scrutinise the application for merits and factual justification if the requested leave is to be granted or not for the petitioner to file the DP.

Other than JPN.KC28, there are no other evidential materials before the court to verify PW's claim that RH had willfully failed to attend the sessions at the tribunal. The evidentiary burden is trite that he/she who alleges a fact is duty-bound to prove that fact (see ss. 101, 102, and 103 of the Evidence Act 1950).

> Burden of proof
>
> S. 101(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> On whom the burden of proof lies.
>
> S. 102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> Burden of proof as to a particular fact
>
> S. 103 states that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless any law provides that the evidence of that fact shall lie on any specific person.

[11] In the circumstances, I find that:

(i) PW has a committed statutory non-compliance in the filing of the DP, which I hold to be fatal;

(ii) Apart from the letter JPN.KC28, which merely stated that RH failed to attend the scheduled meetings, no other evidence was offered to the court to substantiate that RH had wilfully failed to attend those scheduled meetings. There is no averment by PW as to how RH had wilfully failed to attend the scheduled meetings. No information on the purported service of documents from the tribunal to RH is adduced. It is an error in judgment to expect the court to make an inference of wilfulness when JPN.KC28 merely says failure to attend and nothing else.

(iii) Form 2 LRA (General Form of Petition) does not contain anything about prayers for leave to file the DP. It is a statutory form that cannot be amended to suit the need or wants of PW at her request.

[12] I wish to mention in passing that, I dismissed PW's DP without prejudice (since merits of the DP has yet to be ventilated and the rights of parties are yet to be determined), it was a ruling on her non-compliance with statutory requirements, ie, LRA, LRR, and DMPR. A ruling is not a "decision" within the meaning of s. 3 CJA, and consequently, it is not

appealable. The word decision should mean not a part of the decision or the grounds for it but the decision of the suit as a whole (see *Kanhk Sunder Bibi v. Ram Lekhan Pandey* AIR 1956 Pat 325, AIR 1956 Pat 328). In *Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor* [2000] 4 CLJ 152; [2000] 6 MLJ 739, VT Singam J held an order that does not deal with the final rights of the parties on the subject matter in dispute is not conclusive of the main suit and thus not appealable. The Federal Court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ 1, held:

> ... The right to appeal in civil matters under s. 67 of the CJA is subject to the definition of 'decision' as found in s. 3 of the CJA. Although s. 67(1) of the CJA provides that the Court of Appeal has jurisdiction to determine appeals from any 'judgment' or 'order' of any High Court in civil matters, it is clear from a plain reading of s. 3 of the CJA that a 'decision', 'judgment' or 'order' excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties ...

In the premise, an appeal based on the ruling in the dismissal of a DP is not appealable since it does not finally dispose of the parties' rights. This appeal ought to be rejected *in limine*.

Conclusion

[13] In the circumstances of the case, all things considered, I find that PW has failed to comply with the statutory requirements in the filing of the DP, and consequently, I have no hesitation in dismissing this DP without prejudice.